

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
DANIEL WHITE,

Petitioner-Appellant,

-against-

EUGENE S. LeFEVRE, Superintendent,
Clinton Correctional Facility,

Respondent-Appellee.
-----X

BRIEF FOR RESPONDENT-APPELLEE

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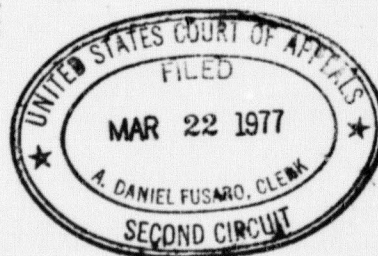


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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York, dated October 15, 1976 (Carter, J.) denying petitioner a writ of habeas corpus.

Questions Presented

1. Whether petitioner has waived his present claim for purposes of federal habeas review, where he deliberately bypassed an orderly state procedure by which he could raise the claim?
2. Whether the findings of the District Court judge are entitled to a presumption of correctness by operation of 28 U.S.C. § 2254(d)?
3. Whether petitioner's statements were voluntary?
4. Whether petitioner was deprived of effective assistance of counsel?
5. Whether any assumed constitutional error was harmless beyond a reasonable doubt, where the evidence that petitioner stabbed James Allen to death was overwhelming?

Facts

Petitioner was convicted after trial by jury in November, 1970, by the Supreme Court, New York County

(Fraiman, J.) of first degree murder in the stabbing death of one James Allen. Petitioner received a sentence of twenty years to life.

Petitioner's conviction was affirmed by the Appellate Division (39 A D 2d 1018 [1972]) and leave to appeal to the Court of Appeals was denied.

Petitioner then filed a petition for a writ of habeas corpus in the Southern District of New York, alleging that he was denied his right to adequate representation by counsel at the pre-trial hearing on his motion to suppress because his lawyer was ill at the time of that hearing. The writ was dismissed for failure to exhaust state remedies (The Hon. Charles L. Brieant). Subsequently, petitioner filed two petitions for writs of error coram nobis, one in New York County, the other in Clinton County. Both writs were denied, and the second order was affirmed by the Appellate Division, Third Department, on April 24, 1975.

Petitioner then filed a new petition in the Southern District of New York, again alleging that his counsel was unable to adequately represent him at the suppression hearing because of illness.

State Court Proceedings

The relevant facts of the state court proceedings are as follows.

A. Request for a continuance because of alleged illness of counsel

On October 20, 1970 at 2:00 P.M., petitioner's case was called for pre-trial hearings. Petitioner's counsel said he was prepared for trial, but then requested an adjournment because he did not feel well because of a problem with broken teeth (18 M). Counsel suggested an adjournment for a day, stating that "(you want me to come in tomorrow, the following day, I'll be only too happy to do so" (20M). The Court ruled (at 24M):

" . . . it is a quarter after 3. . . and Mr. Steinberg has pleaded so eloquently about his present state of health I am inclined to go along with his request that we at least not start today."

The Court adjourned the case for two days and counsel said this was "satisfactory" (24M).

On October 22, 1970, counsel indicated that he was still in pain because of further trouble with his teeth and requested another adjournment. In addition, counsel moved to dismiss the indictment for failure to afford a speedy trial (29M, et seq.). The further trouble with the teeth came at his home in the evening two days earlier (33M). However, that did not stop counsel from working the next day and going to court, presumably on other matter (37M).

The Court denied another adjournment, stating:

"THE COURT: It would appear to me, Mr. Steinberg, from my observation of your appearance this morning in court, that your physical condition will not incapacitate your ability to represent this defendant. Your condition is apparently not one that has been brought upon you suddenly; and in the absence of any medical evidence that you are incapable of proceeding with this trial, I will deny your application for an adjournment of this case on that ground.

We will now proceed with the Huntley hearing today.

MR. STEINBERG: If Your Honor wants medical evidence, give me an opportunity and I will go down to see any doctor right now.

THE COURT: You have had ample opportunity, Mr. Steinberg, to present any such evidence.

MR. STEINBERG: I respectfully except to the Court's ruling.

THE COURT: Very well."

Counsel then proceeded with the Huntley hearing. Immediately after the hearing, which occurred in the morning, the Court ordered the defendant to begin trial that afternoon at two o'clock. Counsel then stated (94):

"If your honor please, I happen to be feeling fairly good now, and I am not complaining on that issue."

B. Huntley Hearing

The trial court held a Huntley Hearing. Three police officers testified at that hearing.

Officer Kopcha testified that the petitioner was left with him alone for approximately an hour after his arrest. Petitioner was not beaten or struck at that time (22). Kopcha did not advise petitioner of his rights because he had no reason to interrogate him (24, 35). The officer testified

that he had idle conversation with petitioner but emphasized that he did not interrogate or question petitioner (33, 34). Kopcha said he got admissions, but did not elaborate on what they were (33).

Detective John Keenan testified that he advised petitioner of his rights and questioned him. This advice consisted of the right to remain silent; the right to speak to an attorney and have an attorney present during questioning; the right to have the court appoint an attorney if he could not afford one; and the risk of having any statements used against him in a court of law (41-42). Petitioner said he understood his rights and would answer questions (41-42). Petitioner then gave incriminating statements, beginning with "Good, I'm glad the son of the bitch is dead."

During the Huntley hearing defense counsel conducted a vigorous and lengthy cross-examination of the prosecution witnesses (25-39, 66-80).

C. Crime

The facts of this crime are set forth in detail in Point V of this brief.

POINT I

THE STATE COURT FINDINGS ON
THE HUNTLEY HEARING ARE ENTITLED
TO A PRESUMPTION OF CORRECTNESS
UNDER 28 U.S.C. 2254(d).

The state court judge conducted a Huntley Hearing and heard testimony from two police officers. At the close of the hearing and after oral argument, the trial court ruled:

"THE COURT: The Court is satisfied beyond a reasonable doubt that the defendant, prior to making the statements which the district attorney seeks to offer into evidence, was not abused or mistreated in any way and that he was fully advised of all of his constitutional rights. And that the defendant understood such rights when they were explained to him.

Accordingly, the Court finds beyond a reasonable doubt that the statements made by the defendant were made voluntarily and accordingly may be submitted to the jury for the jury to make that determination for themselves."

This determination was entitled to the presumption of correctness under 28 U.S.C. § 2254(d), absent some showing that the state court hearing fell into any of the eight subsections enumerated in that statute. No such showing is made

here. Indeed, petitioner's counsel has not even bothered to mention § 2254(d). Although § 2254(d) seems to be ignored with increasing frequency these days, ignoring the law does not make the law go away. See LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Cronan v. Mancusi, 444 F. 2d 51 (2d Cir. 1971); United States ex rel. Sabella v. Follette, 432 F. 2d 572 (2d Cir. 1970).

It cannot be presumed as a matter of constitutional law that the trial court's findings did not include an assessment of the "cat out of the bag" theory urged by the petitioner here. Point III, infra. In this connection, it is significant that this Court has on several occasions found § 2254(d) dispositive or critical in assessing "cat out of the bag" claims.* Tanner v. Vincent, ____ F. 2d ____ (2d Cir. 8/27/76), Slip Op. 5267; United States ex rel. Stephen J.B. v. Shelly, 430 F. 2d 215 (2d Cir. 1970).

* Judge Brieant in dismissing petitioner's first federal writ noted the applicability of the § 2254(d) presumption. See Exhibit "A" to pro se petition.

POINT II

PETITIONER'S STATEMENTS WERE VOLUNTARY.

Assuming arguendo this Court should now (for the first time) examine the voluntariness on the merits of his statements, it is clear that the statements are all voluntary.

Any admission* to Kopcha was unsolicited, spontaneous and voluntary. Kopcha emphasized that he was not questioning petitioner or conducting an interrogation of him.

The United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966) specifically recognized that such solicited and volunteered statements are admissible. The Supreme Court said:

"Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without

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* Petitioner's brief says the admission to Kopcha was the same as the admission to Keenana, but Kopcha at the pre-trial hearing did not say what petitioner said.

the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today" (Emphasis added), 384 U.S. at 478.

Miranda does not say that volunteered statements are admissible only if warnings have been given or counsel retained. It states that volunteered statements of any kind are admissible if not the product of interrogation. There was clearly no "interrogation" here.

The New York courts have repeatedly upheld the admissibility of statements made by a defendant not being interrogated. People v. Kaye, 25 N Y 2d 139 (1969); People v. Torres, 21 N Y 2d 49 (1967); People v. Robles, 27 N Y 2d 155 (1970). In all three cases, the critical issue was not whether the defendant had been given Miranda warnings or had counsel prior to the volunteered statement, but whether

in fact the volunteered statement occurred in the absence of interrogation or an "inquisitorial process." This is precisely the teaching of Miranda. Although petitioner claims the statement at issue here occurred as the result of an "interrogation", it is clear from the record that the detective was not conducting an interrogation or an inquisition.

Assuming arguendo that the Kopcha statement was involuntary, the statements made to Keenan were clearly voluntary. These statements occurred after full Miranda warnings.

Petitioner now argues that the statements to Keenan were inadmissible on a "cat out of the bag" theory, the argument is without merit.

As this Court recently emphasized the fact that a prior admission was once made should not in itself always be fatal to a subsequent admission. Tanner v. Vincent, ___ F. 2d ___ (2d Cir. 1976), Slip Op. 5267, 5275). The fact that a "cat is out of the bag" is only one factor to be considered in ascertaining the voluntariness of a waiver. Id.

The cases relied on by petitioner are all patently inapposite. In United States ex rel. Stephen J.B. v. Shelly, 430 F. 2d 215 (2d Cir. 1970), this Court in finding no valid waiver emphasized the cumulative impact of the immaturity and inexperience of the young boy defendant, who had been crying during the events in question. In addition, the Court in awarding relief noted that the State had not urged the issue of the § 2254(d) presumption, although the State clearly has in this case. Id. 218, f. 4. See also concurring opinion of Hays, J.

In this case, the allegedly improper first admission came during idle conversation, not interrogation, lasting only an hour or so, and whatever the admission was it was not admitted into evidence at trial. It cannot be said that this taints the Keenan statements as a matter of constitutional law. Compare the following (all cited by petitioner): Westover v. United States, 384 U.S. 436 (1966) (prior to receiving any warnings defendant interrogated continuously for 14 hours);

United States v. Knight, 395 F. 2d 971 (2d Cir. 1968), cert. den. 395 U.S. 930 (1969) (valid waiver where questioning of defendant leading to first admission was short and occurred in uncoercive atmosphere); United States v. Pierce, 375 F. 2d 128 (4th Cir. 1968) (no valid waiver where first statements produce of custodial interrogation and were admitted at trial); Fisher v. Scafati, 439 F. 2d 307 (1st Cir. 1971) (no valid waiver where full Miranda warning intervened between oral and written confession, and oral confession obtained under custodial questioning, both admitted at trial); Harney v. United States, 407 F. 2d 586 (5th Cir. 1969) (no valid waiver where oral statements and written confession made to police during eleven hour period of interrogation contributed to statement given to FBI the same day).

Clearly, under all the above circumstances, it cannot be assumed as a matter of constitutional law that the statements to Keenan were causally related to the statement given to Kopcha. Significantly, Judge Brieant in dismissing petitioner's first federal ruled that "(w)e observe in passing that there appears to be no merit to the Miranda claim." Exhibit "A" to pro se petition.

POINT III

PETITIONER WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner claims he was not afforded effective assistance of counsel because his counsel was ill at the pre-trial Huntley hearing. It is admitted that counsel was competent generally, but it is argued that counsel did not make the "judgments" which an "instantaneous" appraisal of "new" information required (Brief, 14). Petitioner concludes that "it can only be assumed that it was his illness that presented his making new arguments" to the Court and that counsel's illness "must" have been the cause of this alleged failure.* This argument is totally devoid of merit.

At the outset, the argument assumes that illness contributed to the failure to make a legal point at the pre-trial hearing which petitioner's counsel on this appeal, seven years later, thinks should have been made. There is no basis in fact for such an assumption other than sheer

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* For purposes of this POINT, appellee assumes arguendo that counsel made an error of "judgment" as petitioner now claims. However, appellee denies that this is the case in fact. See Point II, supra.

speculation. Indeed, counsel's vigorous effort on the pre-trial hearing suggests the contrary is true - namely that counsel was in full possession of his faculties. Indeed, the effort appears to have had the effect of improving his physical condition, since at the conclusion of the hearing counsel claimed he was feeling much better.

The District Court properly identified (appendix) the controlling "sham" and "mockery" standard as to the effective assistance of counsel, a standard reaffirmed by this Court many times. Petitioner, apparently conceding that counsel was not ineffective under the applicable standard, urges a less stringent standard that considers "whether the attorney's conduct in a specific issue in a particular case was adequate under the circumstances" (Brief, 16). The theory is said to be that even the best attorney can have a "bad day" (Brief, 16).

This invitation to adopt a new standard must be summarily rejected. It is an invitation to armchair second guessing and hindsight of legal judgments made by lawyers in

the heat of action and familiar with the atmosphere and subtleties of the particular case. As in every field, lawyers can and do disagree on judgment over a wide spectrum of problems. That someone years later may think a different judgment should have been made or that the trial lawyer was having a "bad day" does not mean that there has been "ineffective assistance" of counsel.

This Court has recently declined to adopt a less stringent standard on direct review of federal convictions. United States v. Yanishevsky, 500 F. 2d 1327, 1333, n. (2d Cir. 1974). State court convictions on federal habeas review should not be subject to a different standard.

If there will come a time for a more stringent standard, this is certainly not the case since the inadequacy complained of here could not have affected the verdict. See Point V, infra.

POINT IV

ANY CONSTITUTIONAL ERROR WAS
HARMLESS. THE EVIDENCE OF
PETITIONER'S GUILT OF MURDER
IS OVERWHELMING.

The evidence that petitioner murdered one James Allen by stabbing him to death is overwhelming. On July 18, 1969, at about midday, a Schwartz Moving Company van arrived at 159 Delancey Street to move the belongings of Deloris White, the wife of the petitioner. James Allen, the driver of the truck, parked the vehicle near the door of the building, and accompanied by his two co-workers, Freddie Garnar and Francis Johnson, he went upstairs to Mrs. White's third floor apartment to obtain her signed authorization for the move. After securing her permission, Allen, in charge of the crew, returned to the truck to load the belongings as Garnar and Johnson carried them down. Allen never set foot in Mrs. White's apartment again.

At about 2:15 p.m., the movers, who had worked continuously since their arrival and who had not taken a lunch break, procured "ears of corn" from a nearby eatery and with their corn in hand, Johnson and Garnar returned to the apartment. Unbeknownst to the movers, their brief corn interlude would only moments later cost James Allen his life.

Entering the apartment, Garnar and Johnson sat down to finish their corn. Suddenly, the petitioner who had been sleeping on a living room couch, arose and inquired "who are these guys in here?" From the kitchen Mrs. White responded, "moving the furniture out" (144-5, 169, 176-8). Petitioner then commanded "You all ain't moving fast enough"; "You will be through in 45 minutes" (145-6, 181). In an apparent attempt to show Garnar and Johnson that he possessed the power to enforce his order, petitioner quickly withdrew a kitchen knife with an eight-inch blade from his belt and approached Johnson. Holding the knife against Johnson's neck, petitioner told Johnson, in Johnson's words, "I didn't be sitting down when I supposed to be moving him" (145-6, 183-4, 249-50).

Johnson, who knew petitioner from the neighborhood, implored, "Move the knife; let me go to work" (200, 248-50, 275).

Petitioner undoubtedly satisfied by his show of strength, removed the blade from the shaken Johnson and the two movers immediately left the apartment and went downstairs to inform Allen of the knife wielding incident.

At the truck Johnson immediately told Allen that "I wasn't working no more because he put a knife around my neck" (149-51, 249-50, 275). And seeing petitioner emerge from the building Garnar and Johnson apprised Allen "That's the guy that's comin down the steps" (151, 197, 249).

Allen seeking to prevent the work stoppage and to gather more information concerning his worker's complaints, jumped from the truck and approached petitioner, asking "What happened upstairs" (151, 200-202, 233-4, 249, 254, 295-6). Allen's repeated inquiry, however, went unanswered.

With the warning, "I'm going to kill you" (151), petitioner withdrew the kitchen knife he had displayed to Johnson and Garnar in the apartment, and pushed Allen. Taken by surprise, the defenseless Allen, although bigger than his

attacker, threw his arms up in an apparent attempt to ward off the deadly blade. But Allen's efforts proved unsuccessful. For petitioner's first thrust with the knife found its mark in Allen's shoulder, penetrating four inches downward into the muscle of his back, and the second strike penetrated "at least" one and a half inches into Allen's "front chest region" and into the left ventricle of his heart (151-2, 202-4, 215-19, 223, 469-72, 479-80). The latter wound was the direct cause of Allen's death. Mortally wounded Allen slumped to the pavement in a pool of blood.

The fatal stabbing was also witnessed by Stanley Fishman, foreman of the Schwartz Moving Company, who, arriving at 150 Delancey Street to check on the progress of the movers, saw petitioner walk from the building, pull out the knife and stab Allen. Alert Fishman, with Garnar's assistance, jumped the armed petitioner, forced the weapon from his hand and held the killer until the police arrived seconds later. The knife and the petitioner were then brought to the station house and as petitioner left the murder scene he was heard to say "I hope I got the motherfucker good" (Fishman: 308, 359-61).

Assuming arguendo, a showing of ineffective assistance of counsel, it does not follow that federal habeas relief must be granted. United States ex rel. Marcelin v. Mancusi, 462 F. 2d 36, 45, n. 14 (2d Cir. 1972). Under all the above circumstances, where overwhelming proof of guilt (absent the allegedly inadmissible statements) included inter alia, abundant, positive and uncontroverted eyewitness identification and petitioner's apprehension at the crime scene, any purported constitutional error was harmless. Chapman v. California, 386 U.S. 18 (1967); Harrington v. California, 395 U.S. 250 (1969). As was said in the case of Milton v. Wainwright, 407 U.S. 371, 377-378 (1972):

"The writ of habeas corpus has limited scope; the federal courts do not sit to retry state cases de novo but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14 years ago by use of evidence not challenged here. . . ."

In Milton, the Supreme Court upheld on federal habeas review a state court conviction even though a confession was arguably inadmissible. The same principles apply here.

Significantly, petitioner here cavalierly ignores the harmless error question, other than to mention in passing that the statements at issue were "obviously damaging" (Brief, 19). On appeal in the state courts, petitioner never even contested his involvement in the homicide; rather he lamely argued that the facts spelled out manslaughter, not murder. That, of course, was a question for the jury.

POINT V

PETITIONER HAS WAIVED HIS CLAIM
BY DELIBERATELY BYPASSING THE
STATE COURTS.

Petitioner has waived his claim for purposes of federal habeas review by deliberately bypassing orderly state procedures by which he could have raised his instant claim.

The claims of ineffective assistance of counsel or the claim of a Miranda violation were never made on direct appeal by petitioner's appellate counsel, although these issues could have been raised from the trial record. Instead, these claims were not made until a collateral coram nobis proceeding in state court. After this application was denied,

a petition for federal habeas corpus was filed. Judge Brieant denied the petition for failure to exhaust state remedies, noting that the state court coram nobis judge in denying the application had not reached the merits on the grounds that a different remedy - state habeas corpus - was available.

Petitioner subsequently filed two motions in state court for a writ of habeas corpus. Neither was considered on the merits. The Appellate Division, Third Department, noted in affirming the denial of the second motion that the issues sought to be reviewed in a habeas corpus motion were in the original record and could have been raised on appeal.

This is yet another case of a petitioner in federal habeas seeking to litigate a claim for the first time in federal court. However, this is an obvious case of deliberate bypass* (Fay v. Noia, 372 U.S. 391, 438 (1963)).

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* In dismissing petitioner's first federal writ, Judge Brieant wrote that "(p)etitioner has intentionally by-passed available state procedures to vindicate his claims. . ." Exhibit "A" to pro se petition.

The issue now sought to be litigated should have been raised on direct appeal, since the matters raised were in the original record. The New York courts so held here. That the issue was not raised was obviously due to the choice of petitioner's appellate counsel who chose to raise other issues on appeal in a well written and cogently argued twenty page Appellate Division brief.* The judgment and decisions of counsel are entitled to weight and respect at the appellate level as well as the trial level. It can hardly be said that the points chosen by counsel for appeal demonstrate any incompetence. In effect, petitioner here is second guessing appellate counsel, although the claim before this Court is disguised as ineffective assistance of trial counsel and although the competence of appellate counsel is not questioned here.

In deciding to argue four points on appeal which did not include the instant claim, petitioner's appellate counsel deliberately bypassed the orderly state court procedure by which the claim could have been raised. Fay v. Noia,

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* The claims raised were (1) intent to kill was not established beyond a reasonable doubt; (2) improper ruling against defendant's claim of marital privilege let in damaging evidence; (3) sentence was excessive and (4) defendant was deprived of speedy trial.

supra. In accord, McMann v. Richardson, 397 U.S. 759, 770-771. ("Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence, depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases").

It is interesting to note that the District Court's opinion made no mention of a purported Miranda issue. This is undoubtedly because Miranda appears to be an appellate afterthought in this Court. The only prejudice alleged in petitioner's petition is that counsel should have called for a mistrial when a juror fell asleep. Thus, not only is petitioner asking this Court to grant federal habeas relief on an issue deliberately bypassed in the state courts*, he is also asking this Court to address an issue not raised before the District Court. It is time this practice was stopped.

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* It appears in view of the foregoing that no state court has considered petitioner's instant claims because of procedural default. Thus petitioner has not even exhausted state remedies, although it appears that because of his own procedural default, no state remedies are still available.

CONCLUSION

THE JUDGMENT BELOWED SHOULD BE AFFIRMED.

Dated: New York, New York
March 17, 1977

Respectfully submitted,

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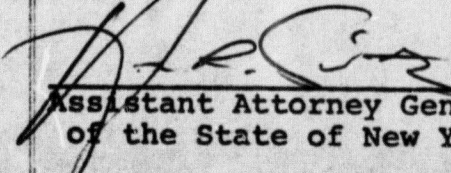
Jill Schenke / , being duly sworn, deposes and
says that he is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellee
herein. On the ~~22nd~~ day of March , 1977, She served
the annexed upon the following named person :

William Gallagher, Esq
Legal Aid Society
Attorney for Appellant

DANIEL WHITE
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Attorney in the within entitled appeal by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by them for that
purpose.

Sworn to before me this
~~22nd~~ day of March , 1977


Assistant Attorney General
of the State of New York

